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American Antitrust Policy in an International Context: A Survey of Jurisdictional Issues

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NOTE

AMERICAN ANTITRUST POLICY IN AN INTERNATIONAL CONTEXT: A SURVEY OF JURISDICTIONAL ISSUES

I. Policy Considerations With Regard To Antitrust

The Supreme Court has declared that: "Antitrust laws in general and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[1]

Significant questions arise, however, when the antitrust laws of the United States are applied to conditions within the international marketplace. As an expression of an economic ideal, debate exists as to the objectives of antitrust enforcement in international trade. Within the legal context, controversy surrounds the extraterritorial extension of jurisdiction under the antitrust laws to reach persons and business entities in foreign nations where particular business activities are not regarded as illegal.

As a statement of economic policy, the Sherman Act is remarkably simple. Section 1 bars "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States, or

1. United States v. Topco Assocs., 405 U.S. 596, 610 (1972) (Marshall, J.); *see also* Northern Pacific Ry. v. United States, 356 U.S. 1 (1958) in which Justice Black described the Sherman Act as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Id.* at 4.

with foreign nations . . . . "[2] Further, section 2 makes it a crime for any "person" to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[3] The aim of the Sherman Act was simply to preserve the essential character of the free marketplace from the evils of monopoly and restraint of trade that had plagued the nation through the latter half of the nineteenth century.[4]

As a statement of law, however, the Sherman Act was devoid of guidelines for the task of enforcement. Senator Sherman, in fact, stated:

> [i]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left to the courts to determine . . . . All that we, as lawmakers, can do is to declare general principles, and . . . the courts will apply them so as to carry out the meaning of the law.[5]

In retrospect, it has been acknowledged that the passage of the Sherman Act conferred upon the courts an exceptional and unprecedented authority to define and determine legitimate behavior in the free marketplace.[6] The amorphousness of the delegated authority explains, in part, the slow and uncertain invocation of the Sherman Act in the enforcement process. Courts were not, however, wholly without evidence as to the legislature's notion of the judiciary's role in deter-

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2. Sherman Antitrust Act, 15 U.S.C. § 1 (1976).

3. *Id.* § 2.

4. *See generally* J. TOWNSEND, EXTRATERRITORIAL ANTITRUST 29 (1980).

5. 21 CONG. REC. 2460 (1890), *quoted in* TOWNSEND, *supra* note 4, at 30.

6. In United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), Judge Wyzanski wrote: "In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law." *Id.* at 348. *See also* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) in which Justice Stone explained:

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. Due to the vagueness of the language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed.

Id. at 489.

mining the limits of fair competition.[7] Speaking on behalf of his bill before Congress, Senator Sherman stated: "[The Sherman Act] defines a civil remedy, and the courts will construe it liberally; they will presume the precise limits of the constitutional power of the government; *they will distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade.*"[8]

A fair reading of Sherman's words would seem clearly to indicate that not all combinations were to be adjudged undesirable. Sherman acknowledged the social utility and lawfulness of certain combinations. The Senator's statement is important, however, because it stands in marked contrast to what has become the prevailing judicial interpretation of the Sherman Act's mandate for free enterprise. Fifty-five years later, in the landmark case of *United States v. Aluminum Co. of America*, Judge Learned Hand wrote: "We have been speaking only of the economic reasons which forbid monopoly; but . . . there are others, based upon the belief that great industrial consolidations *are inherently undesirable, regardless of their economic results* . . . ."[9]

There is a significant distinction between tolerating a combination or monopoly as an aid to production and promoting competition for competition's sake.[10] Critics of the path that antitrust enforcement has taken during the latter half of the twentieth century have pointed to Senator Sherman's words of deference for "lawful combinations in aid of production" to argue that "the only legitimate goal of our pre-

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7. *See* 21 CONG. REC. 2456 (1890); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

8. 21 CONG. REC. 2456 (1890) (emphasis added). Senator Sherman went on to state, "[t]his bill has for its single object to invoke the aid of the courts of the United States to deal with the combinations described in the first section when they affect injuriously our foreign and interstate commerce . . . ." *Id.* He then explained that "[t]he bill does not in the least affect combinations in aid of production where there is free and fair competition." *Id.* at 2457. *See* H. THORELLI, THE FEDERAL ANTITRUST POLICY 180-87 (1955); Bork, *supra* note 7, at 7.

9. 148 F.2d 416, 428 (2d Cir. 1945) (emphasis added). See also United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945) in which Judge Rifkind wrote: "Indeed, the major premise of the Sherman Act is that the suppression of competition in international trade is in and of itself a public injury; or at any rate, that such suppression is a greater price than we want to pay for the benefits it sometimes secures." *Id.* at 525.

10. *See* United States v. National Lead Co., *supra* note 9. "The economic theory underlying the Sherman Act is that, in the long run, competition is a more effective prod to production and a more trustworthy regulator of prices than even an enlightened combination." *Id.* at 525. See also J. TOWNSEND, *supra* note 4, at 29, noting that the ideal of competition "became an aim in itself."

sent statutes is the maximization of consumer welfare."[11] This appeal to the overarching policy objectives of the antitrust statutes rejects, in certain circumstances, the penalization of business arrangements that merely result in a more efficient allocation of resources without posing an actual threat to the marketplace.[12]

Accordingly, it has been recognized that many business actions that have historically been treated as per se violations of our antitrust laws,[13] have been prosecuted for reasons that are irrelevant with regard to the overarching antitrust concern of consumer welfare.[14]

In the context of the global marketplace, questions concerning the ultimate rationale of antitrust regulation take on an even greater significance. The espousal of "competition for competition's sake" seems, by itself, an insufficient guideline to be followed by American courts for resolving the complexities of international trade.[15] Attention must be given to the possibility that the antitrust laws, which have been developed in response to the restrictive practices of private business, do not properly account for a number of situations that can arise within a global trade context. It should be noted that the trading rela-

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11. Bork, *Antitrust in Dubious Battle*, Fortune, Sept. 1969, at 104; H. THORELLI, *supra* note 8, at 227. *See also* J. TOWNSEND, *supra* note 4, at 29. *See generally* Bork, *supra* note 7.

12. *See, e.g.*, Bork, *supra* note 11, at 160.

13. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (Douglas, J.), which has been cited in support of the premise that the per se rule in antitrust actions applies to certain agreements or practices that, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal. Cases decided pursuant to the Sherman Act have found price fixing, market division, group boycotts, quota allocations, tying arrangements, agreements to limit supply or to allocate customers, the division of fields of production and the exclusion of competitors to be per se violations of that Act. *See generally* 1971 TRADE REG. REP. (CCH) ¶ 640. Where a per se antitrust violation is not readily apparent, courts are to be guided by a "Rule of Reason" which calls into play established law as well as the court's interpretation of public policy as embodied in the statute and as may be applicable to the case before the court. Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911). Inquiry following the "Rule of Reason" ends when a per se violation has been found. J. TOWNSEND, *supra* note 4, at 40.

14. Bork, *supra* note 11, at 160.

15. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416 (1945) in which Judge Learned Hand noted that:

> it is quite true that we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.

Id. at 443.

tionships that can arise between businesses within mixed-market or state-controlled economies cannot be said to have been contemplated by the framers of the antitrust laws.[16] Furthermore, the protection of competition as an end in itself may prove inadequate in response to those trade strategies of international businesses that place a higher emphasis on the long-term penetration of markets[17] or the immediate accumulation of foreign exchange[18] than upon profit objectives that would fit more easily within the traditional assumptions of acceptable business behavior.

If the uncertainty concerning the ultimate policy objectives of extraterritorial antitrust enforcement is acknowledged to be substantial, then the jurisdictional premises that support the extension of antitrust regulation to conduct beyond our territorial boundaries are equally open to question.[19] The experience of the courts demonstrates that antitrust laws are meaningful and enforceable only to the extent that they adequately reflect the interest to be protected.[20]

This is not to argue that our antitrust laws should have no extraterritorial dimension, but rather it is to suggest that the mechanical application of antitrust shibboleths as guides to enforcement may be inappropriate to the international arena. As noted above, the ideal of "competition for competition's sake" might be too limiting an assumption for the conditions of international trade. Similarly, the judicial

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16. *To establish a Commission on the International Application of Antitrust Laws: Hearings on S. 1010 Before the Comm. on Governmental Affairs United States Senate*, 96th Cong., 1st Sess. at 118-22 (1979-1980) (remarks of Mark R. Joelson, Chairman of the Committee on the International Aspects of Antitrust Law of the A.B.A. Section of International Law) [hereinafter cited as *S.1010 Hearings*].

17. The marketing strategies of the Japanese electronics industry, for example, have relied on a state supported capital formation structure that utilizes debt-financing at ratios of debt to equity—clearly unavailable to American competitors—which support Japanese companies through several years of minimal profits in the hope of eventually securing large shares of the American markets. *Id.* at 80. The minimal emphasis by Japanese firms on short-term profits does not run afoul of the Antidumping Act of 1921 where the products are not sold at less than their home market value or their reasonably constructed value. *See* 19 U.S.C. §§ 160-171 (1976). Nor does the Sherman Antitrust Act protect a producer from predatory pricing where the competitor's prices do not fall below his own costs. Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 400 (D. Del. 1978). While securing lower prices for domestic consumers the current policies behind antitrust enforcement foster competition without reference to those structural inequalities of the global marketplace, thus placing American companies at a distinct tactical disadvantage. *See generally id.*

18. *See Outboard Marine Corp.*, *supra* note 17, which involved the sale, by the Polish state, of low-priced golf carts in the United States.

19. For a discussion of jurisdictional issues, see notes 51-61 and Parts III & IV of accompanying text *infra*.

20. *Id.*

categorization of certain types of business conduct as per se violations of the antitrust laws,[21] without reference to the nature of the injury and the interest to be protected, may amount to an insupportable interference with the international business process. Accordingly, parochial assumptions about the international marketplace should be identified and reassessed in light of the objectives that are to be served.[22]

II. Statutory Authority And Enforcement Agents

American or foreign businesses that engage in international trade which affects the commerce of the United States[23] are potentially subject to a wide range of antitrust statutes.[24] The Sherman Act, which proscribes restraints of trade, monopoly and attempts at monopoly,[25] does not specifically reach the problems posed by restraints on the import trade or actions that artificially increase the price of imports. In response to these problems, Congress passed the Wilson Tariff Act in 1894.[26] Following this legislation, Congressional attention focused on unfair trade practices in the forms of price discrimination and price fixing. This culminated in the enactment of the Clayton Act[27] and the Robinson-Patman Price Discrimination amendments[28] to that Act in 1914. Further, within the same year, the Federal Trade Commission Act[29] was passed, mandating the creation of an adjudicatory agency, the Federal Trade Commission (FTC), which was charged with developing a unique competence in the prosecution of unfair trade practices and methods.[30]

An exception to the general thrust of America's antitrust legislation was embodied in the Webb-Pomerene Act[31] which exempts from

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21. *See supra* note 13.

22. Prof. Myres McDougal summarizes the issue succintly: "In an interdependent world interference by states in each other's community processes, including economic affairs, is inescapable. The question is by what principles and procedures such interference can be moderated and made reciprocally tolerable in the maintenance and expansion of an international economy." International Law Association, Report of the Fifty-First Conference 304, 331 (1965).

23. 15 U.S.C. §§ 12-14 (1976).

24. *See* notes 25-29 *infra*.

25. 15 U.S.C. §§ 1-7 (1976 & Supp. IV 1980).

26. 15 U.S.C. §§ 8-11 (1976).

27. 15 U.S.C. §§ 12-27, 44 (1976 & Supp. IV 1980).

28. 15 U.S.C. §§ 13, 13(a), 13(b), 21(a) (1976).

29. 15 U.S.C. §§ 41-58 (1976 & Supp. IV 1980).

30. *See* Hastings Mfg. Co. v. Federal Trade Comm'n, 153 F.2d 253, 258 (6th Cir. 1946).

31. 15 U.S.C. §§ 61-65 (1976).

antitrust liability business combinations or associations formed for the sole purpose of exporting goods abroad.[32] The Webb-Pomerene Act is one of the few antitrust statements that affirmatively encourages the development of the export trade. Companies desirous of utilizing the exemption must, however, comply with a number of extensive reporting requirements. It should also be noted that the Webb-Pomerene Act further empowers the FTC to investigate those agreements and associations that the Commission believes to be responsible for artificially enhancing or depressing prices in the domestic market.[33] Since its passage in 1918, few companies have taken advantage of the Webb-Pomerene exemption and the legislation itself has been strongly criticized by antitrust enforcers for being in conflict with the basic philosophy of America's antitrust regulations.[34] Hence, the future of the Webb-Pomerene exemption is uncertain.

Two additional laws relating to antitrust and the conduct of international trade are section 337 of the Tariff Act of 1930[35] and section 201 of the Trade Act of 1974.[36] In a strict sense, these laws cannot be regarded as antitrust statutes even though they empower the United States International Trade Commission (ITC) to carry on investigations and issue sanctions, subject to approval by the President, against unfair methods of competition in connection with the importation of goods. While the role of the ITC may, to a certain extent, overlap with the antitrust efforts of the FTC and the Justice Department, the mandate contained in these two acts is directed toward enforcement against activities that have the "tendency" or "effect" of substantially injuring a domestic industry.

The role of the Chief Executive in reviewing ITC actions invites the politicization of foreign trade issues.[37] In addition, the policy of

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32. *See supra* note 25.

33. 15 U.S.C. § 65 (1976).

34. Speaking in his capacity as the Director of Policy Planning for the Antitrust Division of the United States Department of Justice, Joel Davidow has noted that along with a lack of enthusiasm for Webb-Pomerene's registry and reporting requirements, "product differentiation is also an important reason for the . . . Act's lack of use. American's generally do not want to sell if they do not have labels. They want to make their own reputations." Lacey, *Antitrust and Foreign Commerce: Reach and Grasp*, 5 N.C.J. INT'L L. & COM. REG. 1, 21 (1980). Apart from its general lack of use, the Webb-Pomerene Act has been strongly criticized for theoretically allowing American firms to cartelize their export trade thus making a farce of America's advocacy of strong international antitrust rules. *See* REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 295-306 (statement of the majority) (Jan. 22, 1979), 393-96 (separate view of Commissioner Javits).

35. 19 U.S.C. § 1337 (1976 & Supp. V 1981).

36. 19 U.S.C. § 2251 (1976).

37. *See* Applebaum, *Are U.S. International Trade and Commerce Conduct*

protecting domestic industries expressed in the legislation is in potential conflict with the operative philosophy for the enforcement of antitrust laws, which is simply the protection of "competition."[38]

The possible sources of antitrust litigation facing international businessmen are quite numerous. The Justice Department has historically been charged with the enforcement of the Sherman, Clayton, and Webb-Pomerene Acts as well as relevant portions of the Wilson Tariff Act. Antitrust actions through these statutes usually take the form of civil suits, although the Justice Department is empowered to bring criminal actions under the Sherman Act and through certain provisions of the Clayton Act.[39]

The FTC is specifically charged with the enforcement of the Federal Trade Commission Act, but may also move to enforce the Clayton, Robinson Patman and Webb-Pomerene Acts.[40]

Finally, antitrust violations are subject to treble damage actions by private parties seeking to vindicate claims pursuant to the Sherman, Clayton and Wilson Tariff Acts.[41] Although, in theory, private actions are a cornerstone of the antitrust enforcement policy, the length and complexity of antitrust proceedings makes this remedy unavailable to many potential litigants, even with the incentive of a treble damage award to spur litigation.[42] The suggestion that private litigants further antitrust objectives by acting as enforcers is perhaps something of a myth as section 5(a) of the Clayton Act provides that:

> A final judgment or decree . . . rendered in any

Laws in Harmony with Traditional Antitrust Law and Policy ?, 49 ANTITRUST L.J. 1207 (1980).

38. *See S.1010 Hearings*, *supra* note 16, at 48.

39. *See* E. KINTNER, AN INTERNATIONAL ANTITRUST PRIMER 19-20 (1974).

40. *See* E. KINTNER, A ROBINSON-PATMAN PRIMER 287 (1st ed. 1970), in which the author, noting the question of overlapping enforcement authorities, writes:

> [The FTC] normally enforces the provisions of the Robinson-Patman Act, unless the violation is part of a larger pattern of illegality characterized by Sherman Act violations. For practices violative of both the Sherman Act and § 5 of the Federal Trade Commission Act a number of factors are considered. For example, if criminal proceedings are in order the division (the Justice Department) naturally will be the agency of enforcement.

Id.

41. The original antitrust treble damages provision is contained in Section 7 of the Sherman Antitrust Act, Ch. 647, § 7, 26 Stat. 210 (1890) (superseded by § 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1976)). *See* E. KINTNER, *supra* note 39, at 19-20.

42. *See* Applebaum, *supra* note 37; K. ELZINGA & W. BRETT, THE ANTITRUST PENALTIES 68 (1976).

> proceeding civil or criminal proceeding brought by . . . the United States under the antitrust laws to the effect that the defendant has violated such laws shall be prima facie evidence against such defendant in any action . . . brought by any other party . . . .[43]

Thus, with the successful conclusion of a federal antitrust action, private litigants may take advantage of the outcome.[44] The role of private litigants as enforcers of antitrust policy is thus open to question. The added weight of liability, however, undoubtedly serves as a major deterrent.[45]

III. International Application

One of the more controversial developments concerning the role of America's antitrust laws in the international arena has been the recognition, by the Supreme Court, of the right of foreign sovereigns to bring their own treble damage actions in the United States courts.[46] In *Pfizer Inc. v. India*,[47] the governments of Iran and India invoked section 4 of the Clayton Act against an American drug manufacturer for fixing prices and dividing markets. The Court, by recognizing those sovereigns to be "persons" for the purpose of suit within the Clayton Act,[48] raised a significant question concerning the disparity between the substantially broadened remedies now available to foreign sovereigns and the comparatively limited opportunites for American litigants to obtain redress in foreign forums.[49] Arguably, the decision in *Pfizer* affords greater rights to foreign sovereigns in commercial suits than American plaintiffs would possess.[50]

The Antitrust Division of the Justice Department has supported the right of foreign sovereigns to invoke America's antitrust remedies.[51] Congress, however, has reacted by debating legislation that would pre-

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43. 15 U.S.C. § 16(a) (Supp. IV 1980).
44. *See* K. Elzinga & W. Brett, *supra* note 42.
45. *Id.*
46. Pfizer Inc. v. India, 434 U.S. 308 (1978).
47. *Id.*
48. 15 U.S.C. §12(a) (1976).
49. 434 U.S. at 319.
50. *See S.1010 Hearings*, *supra* note 16, at 72, 90 (statement of William F. Kennedy).
51. Davidow, *U.S. Antitrust, Free Trade, and Non-Market Economies*, 12 J. World Trade L. 473 (1978).

condition the right of foreign sovereigns to bring suit in United States courts on the availability of reciprocal laws and remedies for American litigants in the foreign sovereign's courts.[52]

Within the context of international trade, the multiple enforcement of the antitrust laws has been criticized as being "ill suited to the needs of the United States to speak with a unified voice in matters that importantly affect our international commercial relations"[53] especially where the interests of international trade overlap with the concerns of United States foreign policy. Certainly these are concerns that the courts cannot avoid as has been evidenced by the resolution of a number of cases according to the principles of comity or the act of state doctrine.[54] The abstention by courts in this area, however, points up the need for more explicit statements of policy, so that judicially manageable standards can be applied in the prosecution of antitrust violations.

IV. A Survey of Jurisdictional Issues

A. The Jurisdictional Requirements Of Antitrust Enforcement

In applying America's antitrust laws[55] to restraints of trade or monopolies involving "commerce . . . with foreign nations," the courts have been pressed to develop a theory of jurisdiction that comports with the nation's economic and political interest in competition and open markets.[56] One scholar has noted that, "to find jurisdiction, it was

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52. *See* S. 2395, 95th Cong., 1st Sess. (1977); S. 2486, 95th Cong., 2d Sess. (1978); S. 2724, 95th Cong., 2d Sess. (1978).

53. *S.1010 Hearings*, *supra* note 16, at 160 (remarks of Gary Hufbauer).

54. *See* Parts IVB and IVC *infra*.

55. *See generally* 15 U.S.C. §§ 1-2 (Sherman Act); §§ 12 and 14 (Clayton Act); § 13(a) (Robinson-Patman Act) and §§ 61-65 (Webb-Pomerene Act)(1976).

56. The debate on extraterritorial jurisdictional premises can produce widely divergent results. *Compare* Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. Indus. & Com. Rev. 199 (1977) (in which the authors observe that antitrust laws mandating the protection of foreign commerce pursuant to U.S. Const. art. I, § 8, compel courts to examine the *connection*, if any, between the alleged restraint and the commerce affected, then balance the *reasonableness* of the restraint, if any, against the burdensome effects such a restraint places on commerce) *with* Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 A.B.A. Antitrust L.J. 521 (1974). Professor Rahl asserts that the taking of jurisdiction is proper when a restraint or monopolization occurs either (1) "*in the course of* foreign commerce, *or* (2) if it substantially affects either foreign or interstate commerce." *Id.* at 523. He explains:

> [T]here need be [shown] no effect at all if the complaint oc-

necessary [for the courts] to replace the strictly territorial principle of international law with the protective principle."[57] The protective principle of jurisdiction requires that courts identify injuries to national economic processes that are, in fact, capable of being protected through the principles of free trade and competition.[58] The trend toward protective jurisdictional principles is illustrated in the progression of cases following the Supreme Court's 1909 ruling in *American Banana Co. v. United Fruit Co.*[59]

In *American Banana*, the defendant, the United Fruit Company, conspired in this country with the Costa Rican government to effect a seizure of territory in Panama in which the American Banana Company's plantation was located. The actions of United Fruit deprived the plaintiff of the use of its property and injured its business, thus causing American Banana to bring a suit charging that United Fruit had violated the Sherman Act. Justice Holmes, writing for the Supreme Court, treated the complaint as a suit for the vindication of private rights arising from injury to the defendant.[60] So framed, American Banana's rights in Panama and Costa Rica were found to be dependent on the actions of the Panamanian and Costa Rican governments, the lawfulness or unlawfulness of which were not subject to review by American courts.[61] Thus, even though United Fruit unlawfully sought

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> curs as part of a transaction which itself takes place in export or import trade . . . . The finding of "effect" becomes important only when the restraint is in transactions which occur before, or after, the relevant movement of commerce, or are tangential to it.

Id.

57. J. TOWNSEND, *supra* note 4, at 41.

58. *Id.*

59. 213 U.S. 347 (1909).

60. Although the brief for *American Banana* alleged that the "commerce of the United States may by its statutes be protected from injury by acts done beyond its boundaries," *id.* at 351, the Court's opinion focused solely on the question of recognition by United States courts of a cause of action arising from an injury received in the extraterritorial context. Nowhere in the decision does the Court consider the possibility that injury to the commerce of the United States could form the requisite jurisdictional predicate. *Id.*

61. *See* Underhill v. Hernandez, 168 U.S. 250 (1897). Chief Justice Fuller's formulation of the act of state doctrine states:

> Every sovereign [s]tate is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed by sovereign powers as between themselves.

Id. at 252.

to persuade the Costa Rican government to interfere in a competitor's affairs, it was held that the foreign sovereign's fundamental power to select a course that it "declares by its conduct to be desirable and proper . . . makes [United Fruit's] persuasion lawful by its own act."[62] In conclusion, the Court held that "[a] conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by local law."[63]

The significance of the territorial principle of jurisdiction, enunciated in *American Banana*, was eroded in subsequent cases[64] largely because of the Supreme Court's adoption of a "jurisdictional Rule of Reason"[65] as a general approach to the adjudication of antitrust cases. This theory of jurisdiction for antitrust enforcement was tied, ultimately, to the Court's interpretation of the term "restraint of trade" and, accordingly, the content of those words could be understood only in terms of the interest to be protected.[66]

In *United States v. American Tobacco Co.*,[67] a complex set of agreements and property transactions between an American company and its British competitor led to a division of the world's tobacco markets between them. The arrangements were subsequently challenged by the Government as an illegal restraint of trade. The prosecutors argued, initially, that the term "restraint of trade," as applied to *American Tobacco* required a literal interpretation of the letter of the Sherman Act so as to encompass *every agreement*, reasonable or not, that was made for the purpose of ending a prior trade war between the two competitors.[68] That narrow line of argument, which called for a literal reading of the Act, required, by implication, that the Court exclude from consideration certain business transactions involving mere purchases of property which, although vital to the Government's case,

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62. 213 U.S. at 358.

63. *Id.* at 359.

64. Kingman Brewster has noted that:

> although the *Banana* case is consistent with the long tradition of territorial limitation as a general proposition, it might be distinguished from a situation where effects on United States commerce or trade or commerce with foreign nations were allegedly brought about by private acts abroad. It clearly can be and has been distinguished from cases where foreign conduct was part and parcel of a scheme of restraints some of which took place in the United States.

K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 68 (1958).

65. *See generally* Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911).

66. *See* Bork, *supra* note 11, at 160.

67. 221 U.S. 106 (1911).

68. *Id.* at 177.

could not literally be regarded as agreements or combinations in restaint of trade.[69]

To remedy this deficiency, the Government further argued that the Act must be interpreted, not only according to its letter, but according to its spirit or intent so as to reach even those transactions not covered by the letter of the Act.[70] Through that interpretation, even the most innocent conduct could be found suspect.[71]

The Court noted the contradiction in the arguments and took the occasion to elaborate upon the rule that it had handed down only two weeks earlier in *Standard Oil Co. of New Jersey v. United States*:[72]

> "The [Sherman Act] must have a *reasonable* construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it.". . . [T]he Anti-trust Act only embraced acts or contracts or agreements or combinations *which operated to the prejudice of the public* interests by unduly restricting competition or unduly obstructing the due course of trade *or which, either because of their inherent nature or effect or because of the evident* purpose of the acts, etc., injuriously restrained trade, . . .[73]

The Court then emphasized that,

> [T]he duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade . . . the free movement of which it was the purpose of the statute to protect.[74]

In reaching its decision to remand the case, the Court was unwilling to consider the question of granting immunity to a conspiracy in-

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69. *Id.*
70. *Id.*
71. *See id.* at 179.
72. 221 U.S. 1 (1911).
73. 221 U.S. at 179 (quoting United States v. Joint Traffic Association 171 U.S. 505, 568 (1898))(emphasis added).
74. *Id.* at 180.

volving an American company merely because of the involvement of foreign parties.[75] Questions pertaining to the technical issues of territorial jurisdiction were evidently subsumed in the Court's perception of the construction that was required by the term "restraint of trade" in light of the objectives of the antitrust laws.

Three years later, in *United States v. Pacific & Arctic Railway*,[76] a case involving the attempted monopolization of rail and ship traffic between the ports of the United States and Alaska, the Supreme Court rejected the contention that the passage of foreign routes through Canada placed the challanged restraints outside the jurisdiction of the United States.[77] In a famous passage, the Supreme Court explained:

> This is but saying that the laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route . . . out of the control of either Canada or the United States. These consequences we cannot accept . . . . [The conspiracy] was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations *operating in our* territory, as we undoubtedly may control our own citizens and our own corporations.[78]

With the decision in *Pacific & Arctic Railway*, the possibility of immunity based simply upon the happenstance of extraterritoriality was discarded as untenable when viewed in light of the United States' interest in its economic underpinnings and the movement among nations toward extensive economic and commercial interdependence.

While the extraterritorial circumstances of some of the parties to an action no longer provided a guarantee of immunity, the Court nevertheless continued, in several later cases, to predicate its exercise of jurisdiction upon the emblematic presence of either the parties or their conspiratorial actions within the territory of the United States.[79]

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75. K. BREWSTER, *supra* note 64, at 68; J. TOWNSEND, *supra* note 4, at 44.

76. 228 U.S. 87 (1913).

77. *Id.* at 106.

78. *Id.*

79. *See, e.g.*, Thomson v. Cayser, 243 U.S. 66 (1917); United States v. Sisal Sales Corp., 274 U.S. 263 (1928). The Supreme Court, in *Thomson*, rejected the argument that the legality of transatlantic shipping combinations under foreign law could immunize the

The contemporary theoretical basis for the prosecution of extra-territorial antitrust cases was formulated some thirty-two years after *Pacific & Arctic Railway* with Judge Learned Hand's decision in *United States v. Aluminum Co. of America*.[80]

In *Alcoa*, it was charged that the Alcoa company, along with several foreign corporations, formed a Swiss company to buy pre-allocated ingot production between the several firms at fixed prices.[81] Although Alcoa was determined not to have been a party to the cartel, Judge Hand found that the foreign companies had in fact entered into an arrangement intending to restrict foreign production and thereby affect the import trade to America.[82] In his analysis of the Court's powers of jurisdiction over the foreign defendants, Judge Hand applied the principle of objective territoriality and stated:

> [I]t is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.[83]

Learned Hand's sweeping extension of the Sherman Act's legisla-

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defendants from domestic antitrust laws. The Court noted, however, that the defendants maintained agents in this country who were participants in the scheme and found that "the combination affected the foreign commerce of this country and was put into operation here." 243 U.S. at 88. In *Sisal*, the American defendants set up a Mexican subsidiary and then procured legislation from the Mexican government to grant their subsidiary a monopoly on the sisal fiber trade. In reaching its decision, the Supreme Court did not consider the affirmative acts on the part of the Mexican government a bar to jurisdiction. The Court stated: "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." 274 U.S. at 276.

80. 148 F.2d 416 (2d Cir. 1945).

81. *Id.* at 432.

82. *Id.* at 443-44.

83. *Id.* at 443.

tive jurisdiction to reach the conduct of foreign parties, merely on the basis of the *effects* of their conduct within this country, reduced to a nullity the jurisdictional principle once asserted in *American Banana* that "all legislation is *prima facie* territorial."[84] Although Judge Hand's analysis of jurisdiction had drawn from the text of the Restatement of the Conflict of Laws[85] and had found support by way of analogy from the established practices between states in the areas of criminal law and tort law,[86] the propriety of his application of those principles to the antitrust field has been vigorously questioned.[87] The effects of economic crimes have been argued to be too remote and too speculative to serve as an adequate basis for jurisdiction.[88] In addition, the contrasting views in the international arena as to what might amount to an economic crime afford little or no international consensus for sanctioning such an application of the principle of objective territoriality.[89]

The arguments, however, in support of Learned Hand's analysis of the *effects* principle of jurisdiction cannot be easily dismissed, unless the threat of genuine injury to our economic system from extralegal coercive activity is regarded as illusory. In fact, evidence exists to suggest that the framers of the Sherman Act envisaged its application to foreign parties precisely for the reason that their activities could work to the injury of the economic system without the parties themselves ever subjecting themselves to the territorial jurisdiction of American courts.[90] The argument continues to carry great force, and

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84. 213 U.S. at 357.

85. 148 F.2d at 443; RESTATEMENT OF CONFLICT OF LAWS § 65 (1934) states: "if consequences of an act done in one state occur in another state each state in which any event in the series of acts and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof." *Id.*

86. *See* K. BREWSTER, *supra* note 64, at 73; J. TOWNSEND, *supra* note 4, at 58; Griffin, *American Antitrust Law and Foreign Governments*, 13 J. INT'L L. & ECON. 138 (1978).

87. Kingman Brewster notes that, except with respect to conduct commonly accepted by nations as being criminal, the territoriality principle of jurisdiction can be considered to be a settled presumption which recognizes no exceptions for matters of economic policy on which nations will differ. K. BREWSTER, *supra* note 64, at 73. *See also* J. TOWNSEND, *supra* note 4, at 58, where the author points out that as between nations, "the principle underlying the imposition of liabilities is usually regarded as applicable only to crimes that all civilized nations condemn, such as piracy, but not the economic crime of antitrust."

88. *See* Kintner & Griffin, *supra* note 56, at 223.

89. *Id.*

90. Senator James Z. George, in his remarks on an earlier version of the bill, which apparently did not cover agreements or restraints entered outside the jurisdiction of the United States, stated:

advocates of the *effects* holding in *Alcoa* have pointed out that the very absence of an international enforcement mechanism and the importance of the regulations, justify the application of domestic antitrust statutes.[91] In addition, scholars have observed that the notion of *effects* jurisdiction already finds recognition in international case law and, therefore, cannot be interpreted as a departure from the customary expectations of nations in the international legal system.[92]

The debate over the validity of the *effects* rationale of extraterritorial jurisdiction has preoccupied many legal scholars.[93] But, with the increased enforcement of antitrust policies,[94] and the absorption of the

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> The first thing which attracts our attention, therefore, is that if the agreement or combination, which is the crime, be made outside of the jurisdiction of the United States it is also without the terms of the law and cannot be punished in the United States . . . Then, if these conspirators are foreigners and remain at home . . . and there make the combination or agreement they escape the criminal part of this law . . . The raising of prices and the prevention of free and full competition may all take place in the United States, and yet no crime has been committed.
>
> That this is serious and not a mere fanciful and hypothetical objection is manifest; for it is certain that if the bill becomes a law all combinations and agreements involving large amounts and therefore seriously affecting the welfare of the people of the United States will be outside of the jurisdiction of theUnited States. Canada and Mexico are near neighbors, and the former will certainly become the locality in which these agreements will be made, as it has become the refuge of embezzlers at this day . . . .

21 CONG. REC. 1766 (1890), *quoted in* Kintner & Griffin, *supra* note 56, at 201-02; *see also* note 98 and accompanying text *infra*.

91. *See* Kintner & Griffin, *supra* note 56.

92. *See* The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10.

> It is certain that the courts of many countries, . . . interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, if . . . especially its *effects* have taken place there . . . .

Id. at 23 (emphasis added), *noted in* Kintner & Griffin, *supra* note 56, at 223 n.139. *See also* Comment, *Sherman Act Litigation: A Modern Objective Territorial Jurisdiction and the Act of State Doctrine*, 84 DICK. L. REV. 645, 649-50 n.41 (1980). *See also* the discussion of Commerce and the Antitrust Law 25-29 (1958); Address by John Shenefield presented to the A.B.A Section of International Law, August 9, 1978, *reprinted in* [1979] 5 TRADE REG. REP. (CCH) ¶ 50,386, at 55,837.

93. *See, e.g.*, J. TOWNSEND, *supra* note 4, at 61-2.

94. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, ANTITRUST GUIDE FOR STATEMENT OF PROFESSOR JAMES RAHL, *S. 1010 Hearings*, *supra* note 16.

doctrine into our legal system[95] this debate has, over the course of time, been rendered moot. In addition, it can be noted that several foreign nations have also applied their antitrust laws extraterritorially in what appears to be but a part of a more general international movement toward the enactment of global rules to promote non-restrictive business practices.[96]

Hence, the focus of attention has shifted from the basic premises of extraterritorial jurisdiction, to the development of an adequate judicial characterization of circumstances to guide in the rational application of *effects* jurisdiction. In *Alcoa*, Learned Hand attempted to limit the otherwise innumerable situations in which *effects* jurisdiction might be asserted. He wrote:

> Two situations are possible. There may be agreements beyond our borders not intended to affect our imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. That situation might be thought to fall within the doctrine that intent may be a substitute for performance in the case of

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95. *See, e.g.*, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965):

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory if either (a) the conduct and its effect are generally recognized as constituent elements of a crime . . . or (b)(i) if the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Compare id. with The S.S. Lotus, *supra* note 92.

96. *See* European Economic Community Treaty, Apr. 18, 1951, art. 85, 261 U.N.T.S. 140 and the discussion of that article found in B. HAWK, 2 UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE at 455-59 (1979). *See also* J. TOWNSEND, *supra* note 4, at 61-62.

> a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequences here. We shall not choose between these alternatives; but where both conditions are satisfied, the situation certainly falls within such decisions.[97]

Judge Hand found that the foreign corporations charged in *Alcoa* had signed an agreement, the intent of which was to allocate quotas for the importation to America of aluminum ingots. Accordingly, an intent to restrain trade with the United States could be presumed. Judge Hand then explained that with the presumption of intent established, the burden of proof had shifted to the defendants to demonstrate that their actions did not affect domestic commerce.[98] Thus, the establishment of the intent element, pursuant to Judge Hand's jurisdictional equation in *Alcoa*, created a virtually insurmountable presumption that the activity at issue had affected the commerce of the United States.

Closely following *Alcoa* was the decision handed down by Judge Rifkind in *United States v. National Lead Co.*[99] which was a case involving cross licensing agreements between three competitors for the production of titanium. Each party to the various agreements was assigned the exclusive distribution rights within a particular territory for the titanium compounds produced by its competitors through their various patented processes.[100] The United States Government charged and proved that a conspiracy had been entered into in the United States to restrain and control the world's trade in titanium.[101]

Judge Rifkind's opinion in *National Lead* elaborated further upon the extraterritorial powers of the court.[102] Initially, it was noted that any "combination of competitors, which by agreement divides the world into exclusive trade areas, and suppresses all competition among the members of the combination, offends the Sherman Act." Having found the division of world markets, with its subsequent effect on domestic commerce to be illegal per se, the court reviewed the adequacy of the defenses raised by the defendant.[103] The court then turned to

97. 148 F.2d at 443-44.
98. *Id.* at 444-45.
99. 63 F. Supp. 513 (S.D.N.Y. 1945).
100. *Id.* at 518.
101. *Id.* at 524.
102. *Id.* at 523.
103. *Id.*

the argument raised by the foreign party defendants that the court had no power to invalidate the contracts of parties not subject to the court's jurisdiction.[104] Rifkind answered by noting that although the absence from the court of the foreign defendants would

> place a practical limitation upon the scope of the court's decree; it does not prevent the court from finding a violation as the facts warrant, and from restraining those within the reach of its mandate from continuing a conspiracy in defiance of the Sherman Act.
>
> . . . .
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> Were the rule . . . [that this court cannot invalidate contracts with parties who are not within the court's jurisdiction] allowed to operate in the field of restaint upon the foreign commerce of the United States, it would paralyze the enforcement of the law in all cases where one or more of the parties to the conspiracy was an alien corporation over whom the court could acquire no personal jurisdiction. The courts do not so readily permit a frustration of valid national policy.[105]

Judge Rifkind's analysis made it clear that the power of a court's personal jurisdiction over foreign parties was, at best, a relatively minor impediment to the court's furtherance of antitrust objectives.[106] The judiciary's power to determine the subject matter of the Sherman Act ensured that the court could exert a significant amount of leverage over foreign defendants whether or not they chose to submit to personal jurisdiction.[107] The decision of a foreign defendant to avoid the jurisdiction of the American courts in domestic antitrust actions is thus tantamount to a decision to forego all participation in the American marketplace. It seems apparent that many foreign corporations perceive exclusion from the American marketplace to be a greater hardship than antitrust enforcement.[108]

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104. *Id.* at 525.

105. *Id.*

106. The determination of personal jurisdiction over foreign party defendants follows the Supreme Court's test of "sufficient minimum contacts" between the forum state and the defendant party first stated in International Shoe Co. v. Washington, 326 U.S. 310 (1945); *See* Davidow, *U.S. Antitrust and Doing Business Abroad*, 5 N.C.J. INT'L L. & COM. REG. 23, 27 (1980).

107. *Id.*

108. Joel Davidow, the then Director of Policy Planning for the Antitrust Divi-

The foreign defendants in *National Lead* also argued that the court must apply a "Rule of Reason" in considering their conduct.[109] Pointing out that no injury from their conduct had been shown and that, in fact, the arrangement under attack had resulted in increased production and low prices which benefited the public.[110] Judge Rifkind responded by rejecting any arguments that would have placed the court in a position of determining the social utility of particular instances of anticompetitive conduct, and declared that the interpretive powers of the courts were limited to carrying out the purpose of the Sherman Act. He wrote that: "[T]he major premise of the Sherman Act is that the suppression of competition in international trade is in and of itself a public injury; or at any rate, that such suppression is a greater price than we want to pay for the benefits it sometimes secures."[111]

Faced with the contention that American business could not avoid entering into cooperative arrangements and still compete in a "cartelized" world, Rifkind noted that any reconsideration of the mandate of the Sherman Act must be left to Congress.

> [Congressional inquiry] is appropriate to the evaluation of the merits of the proposition. For the

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sion of the Department of Justice has written:

> [T]his theory of substantive jurisdiction based on the effects of a business practice can usually be utilized effectively only in a case where personal jurisdiction is available against the relevant parties. However, . . . [t]here have been cases in which a foreign company was indicted and stayed out of the United States for a number of years, but then voluntarily agreed to pay a fine and settle the lawsuit because executives of the company wanted to be free to do business or travel in the United States without the risk of an arrest based on pending charges.

Davidow, *U.S. Antitrust, Free Trade, and Non-Market Economics*, 12 J. WORLD TRADE L. 473, 475 (1978). In another article Davidow stated:

> The Department of Justice has stated its willingness, where appropriate, to seek indictment even of an absent defendant against whom personal jurisdiction is not available. This is done to force the culprit to answer the antitrust charge or refrain from entering the United States for business or other purposes while the indictment pends — possibly indefinitely.

Davidow, *supra* note 106, at 27. Such enforcement strategies suggest that those foreign companies in positions of economic power that are capable of mounting a threat to America's commerce, are also those companies which have the most to lose if excluded from participation in the American market.

109. *See supra* note 13.

110. 63 F. Supp. at 525.

111. *Id. See also supra* notes 9 and 10.

> courts it is conclusive that Congress has not yet validated such a solution to the problem. Until it does, private agreement and combination and private regulation may not substitute for legislation. Only Congress, not the courts, may grant the required immunity.[112]

Acknowledging the responsiblities of the courts in the enforcement of antitrust matters, the question persists as to whether Judge Rifkind's refusal to consider the social utility of the defendant's conduct is consistent with either the Sherman Act's mandate or the rationale behind the judiciary's unique role in defending that mandate. As has already been noted, the guidelines for judicial enforcement of the Sherman Act were vague,[113] but implicit in the vagueness of the statute is the intent that the courts provide a flexible approach in giving content to antitrust policies and enforcement.[114] The role of the courts in antitrust enforcement may be compared with an administrative agency. The courts are charged not merely with the adjudication of cases and controversies, but also with the formulation of the principles of antitrust policy itself.[115] In light of the policy-oriented role of the courts, Judge Rifkind's demarcation of the court's mandate in the interpretation of antitrust principles seems an ill-founded and unnecessary barrier to the consideration of the merits of a particular defense. Such a limitation undermines the flexibility of judicial review in an area of law that requires a periodic reexamination of the policy objectives at stake.

B. The Development of a Jurisdictional Rule of Reason

Since the decisions handed down in *Alcoa*[116] and *National Lead*,[117] both the courts and respective enforcement agencies have struggled to refine policy guidelines for the assertion of extraterritorial

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112. 63 F. Supp. at 526.

113. *See supra* notes 2-22 and accompanying text.

114. *See* R. Bork, The Antitrust Paradox (1978). "Antitrust is . . . a set of continually evolving theories about the economics of industrial organization [and] . . . the general movement has been away from legislative decision by Congress and toward political choice by courts." *Id.* at 10. *See generally*, J. Townsend, *supra* note 4, at 30-33.

115. *See supra* text accompanying note 5.

116. *See supra* note 80.

117. *See supra* note 99.

jurisdiction based on the principle of objective territoriality.[118]

The *Alcoa* jurisdictional test which consisted of a showing of both the intent to affect commerce *and* a showing of effects upon America's domestic or foreign commerce,[119] in fact, provided more favorable treatment to foreign parties than to domestic defendants who could not challenge subject-matter jurisdiction where their actions were found merely to have affected commerce.[120] Later decisions restated the jurisdictional test in a disjunctive form to require a showing of either the "intent to affect" *or* "actual effects" on America's commerce.[121] Another formulation was proferred by the Justice Department, which declared as its jurisdictional test the requirement that the challenged conduct have a "substantial and foreseeable effect on U.S. commerce."[122] The Justice Department's Antitrust Guide for International Operations indicates that the underlying consideration in the assertion of extraterritorial jurisdiction has to do with the sufficiency of the impact on United States commerce.[123] Subsequent cases have held that the sufficiency of an *effects-* or *impact*-based jurisdictional predicate must be measured against a variety of competing interests, against

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118. *See supra* text accompanying note 83.

119. *See supra* text accompanying note 97.

120. *Id. See also* Rutledge, *Sherman Act Litigation: A Modern Generic Approach To Objective Territorial Jurisdiction and the Act of State Doctrine*, 84 DICK. L. REV. 645, 652 (1980).

121. *See* United States v. Imperial Chemical Indus., 100 F. Supp. 504, 557 (S.D.N.Y. 1951); *see generally* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 611 (9th Cir. 1977) (reviewing the many jurisdictional tests); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18, Comment f (1965) (noting that intent may be presumed where "those responsible for the conduct had reason to foresee that the effect within the territory would result from the conduct outside."); *see also supra* note 95; *but see* note 122 *infra*.

122. *U.S. Dep't of Justice, Antitrust Division, Antitrust Guide for International Operations* 6 (1977). *But see* Davidow, *supra* note 106.

> A question regarding the selection of defendants in a foreign case is the defendant's *mens rea*. For purpose of fairness and equity, we [the Justice Dep't] have taken the view when indicting individual for a criminal offense, that there should be some reason to believe that he knew he was violating the antitrust law. Conceivably, . . . [an] American might be held to a higher standard of knowledge than the foreigner.

Id. at 35.

123. *Antitrust Guide, supra* note 122. In at least one case involving a private party's action to enjoin a major foreign firm's exports to the United States based on an injury to that plaintiff, the Justice Department entered the appeal process as amicus curiae to argue that it was bad public policy to allow disruption of a major industry based on an injury to the interests of a single U.S. firm. *See* Calnetics v. Volkswagen of America, 532 F.2d 674, 693 (9th Cir. 1976) *discussed in* Davidow, *supra* note 108, at 478.

which the courts must further weigh the assertion of jurisdiction.[124] Challenges to jurisdiction based on a competing interests mode of analysis have proven more fruitful than defenses which require judicial clarification or resolution of the ultimate policy objectives of antitrust enforcement.[125]

In *Timberlane Lumber Co. v. Bank of America*,[126] Timberlane charged that the Bank of America and others had conspired to drive that company out of Honduras by persuading the Honduran government to enforce security interests that were being held against Timberlane's milling operations.[127] The district court dismissed Timberlane's suit explaining that the act of state doctrine barred any examination of the Honduran government's acts.[128] The Court of Appeals for the Ninth Circuit reversed, noting that the act of state doctrine was inapplicable as there was nothing in the suit to challenge the sovereignty of Honduras nor to implicate its relations with the United States government.[129] Judge Choy, writing for the Ninth Circuit, found no bar to the assertion of extraterritoral jurisdiction.[130] The court considered, however, the limitations inherent in the assertion of *effects-based* jurisdiction. The court stated:

> [t]hat American law covers some conduct beyond this nation's borders does not mean that it embraces all . . . . [I]t is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.[131]

Judge Choy noted that the effects test taken by itself failed to

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124. Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 563 (1976), which states:

> Although the courts have spoken in the terms of the *Restatement* and of Congressional policy, findings that an American effect was direct, substantial, and foreseeable, or within the scope of Congressional intent, have little independent significance. Instead, cases appear to turn on a reconciliation of American and Foreign interests in regulating their respective economies and business affairs.

quoted in Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 611 (9th Cir. 1977).

125. *See* Note, *supra* note 124.

126. 549 F.2d 597 (9th Cir. 1977).

127. *Id.* at 604-05.

128. *Id.* at 601.

129. *Id.* at 608.

130. *Id.* at 615.

131. *Id.* at 609.

consider either the interests of other nations or the interests of the American government.[132] He then went on to formulate a jurisdictional "rule of reason" consisting of a "tripartite analysis" with which to consider the appropriateness of the assertion of *effects-based* jurisdiction.[133] Judge Choy reasoned that,

> [T]he anti-trust laws require . . . first . . . that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction . . . . Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws . . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.[134]

The Ninth Circuit thus sought to revitalize conflict of laws considerations relevant to the contemplated assertion of extraterritorial jurisdiction for antitrust statutes. The court added that comity and a conflict of laws approach to jursdiction required a consideration of

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[135]

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132. *Id.* at 611-12.
133. *Id.* at 613.
134. *Id.*
135. *Id.* at 614.

In its application of these principles to the suit before it, the Ninth Circuit found no indication that there was any conflict between the assertion by American courts of extraterritorial jurisdiction and Honduran law and policy.[136]

C. Comity and Judicial Abstention

In his *Timberlane* decision, Judge Choy noted that any assessment of the significance of the contacts of various nations with regard to a particular controversy, required that reviewing courts distinguish between a line of inquiry that the act of state doctrine prohibits and an inquiry which balances the interest of competing states. Judge Choy explained:

> [T]here is an important distinction between examining the validity of the "public interests" which are involved in a sovereign policy decision amounting to an "act of state" and evaluating the relative "interests" which each state may have "in providing the means of adjudicating disputes or claims that arise within its territory." Our "jurisdictional rule of reason" does not in any way require the court to question the "validity" of "foreign law or policy." Rather, the legitimacy of each nation's interests is assumed. It is merely the relative involvement and concern of each state with the suit at hand that is to be evaluated in determining whether extraterritorial jurisdiction should be exercised by American courts as a matter of comity and fairness.[137]

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136. *Id.* at 615. The court then remanded the case for further consideration in light of the decision. *Id.*

137. *Id.* at 615 n.34 (*quoting from* Restatement (Second) of the Foreign Relations Law of the United States § 41 comment d (1965)); *accord*, address by John H. Shenefield, Assistant Attorney General, Antitrust Division, before the American Bar Association's Section of International Law (Aug. 9, 1978), *reprinted in* [1979] 5 Trade Reg. Rep. (CCH) ¶ 50, 386. Shenefield states:

> It is important to emphasize that [Judge] Choy did not require the courts to *balance* the interest of the United States parties against those of the other nations involved. What he required was that *the interests of the United States* in prosecuting the violations be measured both quantitatively and qualitatively against the potential damage to *United States foreign relations* generally that might result.

Id. (emphasis added).

In considering the extraterritorial reach of the antitrust laws, the principle of objective territoriality may be understood to be a necessary, but possibly insufficient condition to trigger an American court's jurisdictional powers.[138] Thus, in the extraterritorial context, the national interest in protecting fundamental economic policies may not be allowed to obscure the overriding policies that characterize the developing legal relations between sovereign states.[139] Deference to the objectives of international law and the laws of other nations must be observed in order to secure stability in the international arena. Justice Jackson has observed:

> International Law . . . does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own . . . But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.[140]

To disregard the principle of comity in the extraterritorial application of American antitrust laws is to ignore the potential benefits that lie in encouraging reciprocity of treatment in the arenas of foreign trade policy and judicial redress.[141] Similarly, the disregard of the policy interests of other nations invites retaliatory legislation and the erection of divisive barriers in the international legal process.[142]

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138. 549 F.2d at 608-09.

139. *Id.*

140. Lauritzen v. Larsen, 345 U.S. 571, 582 (1953); *see also* M. McDOUGAL, H. LASSWELL & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 647 (1963).

141. It has been pointed out, that in reexamining the extraterritorial application of American antitrust laws, increased attention should be paid to the objective of obtaining foreign acceptance of antitrust judgments so as to develop the policy of "full faith and credit" for adjudicatory proceedings within a global economy. *See S. 1010 Hearings, supra* note 16, at 120 (remarks of Mark Joelson).

142. *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563

The principle of comity[143] has been embraced by Justice Department officials as an "objective standard" that permits courts in foreign antitrust cases "to raise essential questions previously left to the political process or ignored altogether."[144] In *Timberlane*, however, the comity analysis[145] is but part of the *ad hoc* decision making process carried out by the courts. In balancing the relative interests underlying this concept and the interests of other nations in a given controversy, questions concerning national trade policy, diplomacy, balance of payments, economic analysis and national priorities may compete for the court's attention. The competence of the courts to handle such diverse and complex issues has been questioned,[146] and the need for legislative guidelines and international agreements to clarify America's enforcement interests is clear.[147]

F.2d 992 (10th Cir. 1977) wherein the court sustained a comity rationale for nonproduction of discovery requests where those requests would have violated Canadian law and interfered with Canada's national interests. The enactments of blocking statutes by several foreign nations to bring to a halt unwelcomed American discovery proceedings within their own territories presents a striking example of shortsightedness on the parts of American courts and enforcement agents and equally shortsighted retaliatory behavior on the parts of the foreign states. *See* Britain's Protection of Trading Interests Act, 1980, c. 11, Halsbury's Statutes of England 2. Current Statutes Service 305 (1980). ('Current Law' Statutes Ann. 1980, pt. 2 c.11). Australia, Canada, The Federal Republic of Germany, the Netherlands, South Africa and the United Kingdom have blocking statutes on their books. *See* B. HAWK, *supra* note 96, at 318-19 (1979). The inhibiting effect of such reactions on global economic and legal processes would seem to indicate that the problem will ultimately be resolved through bilateral agreements or treaties. *Id.*

143. The *Timberlane* comity rationale has been adopted in Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979) as well as in Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979). *But see In Re* Uranimum Antitrust Litigation, 1980-1 Trade Cas. (CCH) ¶63,183 at 77,895 (7th Cir. 1980) in which the court held that considerations of the effects of challenged conduct, as well as the consideration of comity and fairness as guidelines to the exercise of jurisdiction, lay within the firm discretion of the trial judge and therefore could not be overturned in the absence of a finding of an abuse of discretion. In that particular controversy, the decision of the trial judge to exercise jurisdiction was upheld on the basis of his findings concerning the complexity of the litigation, the seriousness of the charges, and the recalcitrance of the offending parties. The Seventh Circuit's affirmance has been sharply criticized for permitting such a superficial accounting of the interests of the foreign states. *See* Blechman, *Antitrust Jurisdiction, Discovery and Enforcement in the International Sphere*, 49 ANTITRUST L.J. 1197, 1200-04 (1980).

144. Address by John Shenefield, *supra* note 137, at 55, 856-57.

145. 549 F.2d at 613.

146. *See S. 1010 Hearings*, *supra* note 16.

147. *See* the prepared statement of John Shenefield, *S. 1010 Hearings*, *supra* note 16, at 46; Testimony of William F. Kennedy, *id.* at 70; prepared statement of Professor James Rahl, *id.* at 102-03.

D. The Act of State Doctrine and The Shielding of Anti-competitive Behavior

The extent to which sovereign states validate, coerce, or implement particular types of trade activity necessarily affects the amount of deference that American courts will accord to challenged behavior in the international marketplace.[148]

The act of state doctrine expresses the principle that,

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment of the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of sovereign powers as between themselves.[149]

The policies behind the act of state doctrine have been subject to conflicting interpretations. In *Banco Nacional de Cuba v. Sabbatino*,[150] Justice Harlan grounded the doctrine in a separation of powers analysis which required that the Court defer to the political powers held in the Executive branch, rather than pass on the validity or invalidity of a foreign act of state.[151] It has been noted, however, that any mechanical application of the doctrine to deny judicial involvement in controversies would be an "abdication of the judiciary's responsibility."[152] Other writers have argued that the act of state doctrine better serves the objective of stability in the community of nations if interpreted on conflict of laws principles[153] that require the courts to weigh the policies of competing states against the facts of a given controversy.[154]

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148. *See* Underhill v. Hernandez, 168 U.S. 250 (1897).

149. *Id.* at 252.

150. 376 U.S. 398 (1964).

151. *Id.* The Court held that the expropriation by the Cuban government of assets belonging to a private corporation could not be questioned by American courts even though the expropriation was alleged to have violated both Cuban and international laws.

152. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1972) (Powell, J., concurring). *See also* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1977). "[I]t is apparent that the [act of state] doctrine does not bestow a blank check immunity upon all conduct blessed with some imprimatur of a foreign government." *Id.* at 606.

153. *See, e.g.*, Leigh & Monroe, *Dunhill: Toward a Reconstruction of Sabbatino*, 16 Va. J. Int'l L. 685 (1976).

154. *See generally* M. McDougal, H. Lasswell & I. Vlasic, *supra* note 140, at

The act of state doctrine, unlike the principle of sovereign immunity, which is available only to government entities, can be extended to defend the actions of private litigants whose affairs are intertwined with the sovereign.[155] It is clear, however, that an act of state defense must be founded on more than the mere acquiescence of a sovereign to the challenged conduct.[156]

A more difficult question concerns the applicability of the act of state doctrine to the commercial activities of a foreign sovereign.[157] While the act of state doctrine offers no "blank check immunity" for the actions of foreign sovereigns,[158] the commercial activity exception to that doctrine compels a judicial inquiry into the nature of challenged foreign governmental activity that seems at odds with the purposes of the doctrine as formulated in *Sabbatino*.[159] In *Hunt v. Mobil Oil Corp.*,[160] the Court of Appeals for the Second Circuit considered the claim that the Libyan government's nationalization of Hunt's oil fields was, at least in part, a commercial act.[161] Hunt alleged that the expropriation his company suffered was the consequence of an illegal combination of Persian Gulf oil interests who had conspired to injure independent Libyan producers.[162] The Court of Appeals acknowledged the reality of the commercial activity exception to the act of state doctrine, but at the same time, seized upon the bombastic declarations of Colonel Qaddafi and a single note from the State Department to con-

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662-66 and sources cited therein.

155. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 5.03 [2], at 5-37 (1980).

156. *See* United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. ¶ 70,600 (S.D.N.Y.), *order modified* 1965 Trade Cas. ¶ 71,352.

157. Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1973).

> We are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarassing conflicts with the Executive Branch . . . . [W]e fear that embarassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our courts.

Id. at 697-98.

158. *See supra* note 152.

159. *See supra* note 151 and accompanying text. *See also* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 110 (C.D. Cal.), *aff'd per curiam* 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1971). ("[I]nquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert.").

160. 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

161. 550 F.2d at 73.

162. *Id.*

clude that the conduct of the Libyan government was "political" and, therefore, non-justiciable under the act of state doctrine.[163]

The *Hunt* opinion, it is submitted, is highly unsatisfactory because of the court's unwillingness to look beyond the arguably superficial rhetoric that accompanied the Libyan expropriation. While paying "lip service" to the commercial activities exception, the court never permitted itself to consider the merits of the plaintiff's allegation that the take overs were motivated by Libya's commercial interests. The decision in *Hunt* illustrates the tendency of the courts to abdicate the judicial function in deference to political issues that the *Sabbatino* decision has allocated to the Executive branch of the government.[164] The fundamental difficulty seems to lie in the refusal by courts to look beyond activities that are merely labelled as political and to consider the actual substance of the challenged act.

Other decisions have established that certain types of sovereign activity do not rise to the level of an act of state.[165] In *Outboard Marine Corp. v. Pezetel*[166] an action was brought challenging the sale of low-priced Polish golf carts within the United States.[167] The U.S. District Court of Delaware found that as the sale of the carts in no way implicated Polish political processes or that nation's sovereignty, the act of state doctrine was inapplicable.[168]

The characteristic problem for the courts in reviewing act of state defenses is the determination as to when government acts take on the essential attributes of sovereign acts. There is little doubt, however, that private companies can effectively shield otherwise prohibited conduct under the act of state doctrine by soliciting or lobbying for anticompetitive legislation within the foreign state. Thus, in *American Banana*[169] the Supreme Court stated: "[I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper . . . It makes the persuasion lawful by its own act."[170]

The Supreme Court's reasoning in *American Banana* was held to

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163. *Id.*

164. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430-34 (1964) (Harlan, J.).

165. *See* VON KALINOWSKI, *supra* note 155, at 5-35.

166. 461 F. Supp. 384 (D. Del. 1978). *See also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979) (mere issuance of patents by foreign power does not constitute an act of state).

167. 461 F. Supp. 384.

168. *Id.* at 409-10.

169. 213 U.S. 347 (1909).

170. *Id.* at 358.

be controlling in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,[171] where the defendant companies were charged with inducing foreign sovereigns to claim title to the plaintiff's oil concession.[172] The *Buttes* court barred the action as a claim for injuries flowing from the acts of the sovereign.[173]

The inducement of anticompetitive legislation is also shielded by the *Noerr-Pennington*[174] doctrine which protects lobbying efforts from antitrust liability on the basis of the consititutional right to petition.[175] Although the applicability of the *Noerr-Pennington* doctrine to foreign litigants is uncertain, the Justice Department has nevertheless accepted the validity of the theory in its Antitrust Guide for International Operations.[176]

E. Foreign Sovereign Compulsion

A circumstance raising antitrust issues of a different character occurs when a private business entity is compelled to conduct its operations within a foreign sovereign's territory in a manner that is violative of American laws. In such situations there is no question of collusive or conspiratorial activity on the part of the defendant company,[177] nor can American courts demand that a foreign sovereign comply with American laws.[178] Unlike the act of state doctrine which focuses primarily on the appropriate response of courts to the contested acts of a sovereign government,[179] the notion of foreign sovereign compulsion requires that courts be guided by a policy of fairness toward a defendant

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171. *Supra* note 159.

172. *Id.*

173. *Id.* at 110. *See also supra* note 167.

174. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *see also* UMW v. Pennington, 381 U.S. 657 (1965).

175. 365 U.S. at 137-38.

176. *Supra* note 122.

177. The foreign sovereign compulsion defense offers no immunity for trade activities that are merely permitted by the foreign sovereign (Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)) or where the defendant company has deliberately acted to bring about discriminatory legislation in a foreign state (United States v. Sisal Sales Corp., 274 U.S. 268 (1927)).

178. *See, e.g.*, United States v. Watchmakers of Switzerland Information Center, Inc., *supra* note 156. The court stated: "If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation." *Id.* at 77.

179. *See Sabbatino, supra* note 164.

that is caught between the laws of two or more nations.[180]

In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,[181] the Venezuelan Government forbade its oil concessionaires to ship oil to Interamerican, an oil exporting firm located in New Jersey.[182] Because Interamerican was an exporter it could operate without being subject to import quotas or tariff restrictions[183] and was, therefore, able to offer Venezuelan oil to world markets at less than posted prices.[184] The effect of the Venezuelan Government's order to its concessionaires was to launch a boycott against Interamerican by depriving that company of any oil suppliers.[185] Interamerican then brought an action against the Venezuelan suppliers charging that a refusal to deal consitituted a violation of antitrust laws.[186] The defendants, in building their case, raised the defense of foreign sovereign compulsion and the court agreed, stating:

> It requires no precedent, however, to acknowledge that sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. . . . Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce. (citation omitted). . .Commerce may exist at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands.[187]

It is clear that the crucial question for courts in reviewing a sovereign compulsion defence "is whether the challenged anticompetitive conduct was in fact compelled. . . . Mere acquiescence, approval or delegation of authority [by a foreign sovereign] is not sufficient."[188] It seems that the most relevant inquiry into the substance of the foreign compulsion defense would focus on the effective powers of those who

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180. *See* B. HAWK, *supra* note 96, at 151.
181. 307 F. Supp. 1291 (D. Del. 1970).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1298.
188. B. HAWK, *supra* note 96, at 152-53.

would compel a company to act in a particular way. It would be unrealistic to assume that foreign compulsion can always by indentified by virtue of the presence of official legal practices. Furthermore, any inquiry into the validity or legality of challenged sovereign actions would most likely run afoul of the act of state doctrine.[189]

An extensive analysis of the repercussions of foreign compulsion on American interests was conducted by the Justice Department in the suit against the Bechtel Corporation for its compliance with the "Arab boycott" of American firms that dealt with Israel.[190] The pragmatic solution of the consent decree entered in *Bechtel* permitted that company to engage in business with the foreign instigators of the boycott but prohibited Bechtel from participation in the boycott selection process or in any conduct that directly injured United States persons.[191] The decree sought to reemphasize the distinction between attempting to regulate the conduct of American nationals abroad whose activities could not be said to have an impact on American commerce, or its citizens, and the prosecution of those entities who actively participated in furthering foreign schemes to injure American interests.[192] Thus, Bechtel was permitted to comply with the Arab League's boycott, but was not permitted to further it in any way.[193]

F. The Foreign Sovereign Immunities Act of 1976

Unlike the act of state doctrine, which is available to any party in a proceeding,[194] the privilege of immunity contained in the Foreign Sovereign Immunities Act of 1976 [FSIA][195] may be invoked only by the sovereign itself.[196] The FSIA differs further from the act of state doctrine in its creation of a statutory exception to the grant of immunity for the sovereign's participation in commercial activity which has

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189. *See, e.g.*, 307 F. Supp. at 1298-99.

190. United States v. Bechtel Corp., (1979-1) Trade Cas. ¶ 62,429 (N.D. Cal. 1979) (consent decree); *id.* at ¶ 62,430 (opinion); *see especially* the Justice Department's statement in support of the proposed *Bechtel* consent decree in 43 Fed. Reg. 12,657-64 (1978), *reprinted in* B. Hawk, *supra* note 96, at 156-65.

191. *Id.* at 158-59.

192. *Id.*

193. *Id.*

194. *See* Von Kalinowski, *supra* note 155, at 5-37.

195. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), 1602-1611 (1976)).

196. 28 U.S.C. § 1604 states: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

a direct effect on American commerce.[197] Pursuant to Section 1606 of the FSIA, litigants may sue the sovereign itself for only the actual damages that have been suffered,[198] however, the litigant may subject state instrumentalities[199] or state owned corporations, to the treble damage claims that are allowed in private antitrust actions.[200]

The function of the FSIA may be best understood as a response to the expanding activities and roles of foreign governments in trade activity that characterized the international marketplace in the years following World War II.[201] During that period, it became evident that extensive participation by foreign states was inconsistent with a blanket grant of immunity to the wide variety of activities carried on by sovereign entities.[202]

In 1952, Jack B. Tate, then the Acting Legal Advisor of the State Department, sent a letter to the Justice Department which was to become famous because of its important clarification of the policies which should guide the United States Government in responding to the competing interests of foreign states and private parties who sought to enter the international marketplace.[203] Mr. Tate wrote:

> The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments without their consent should not be changed. . . . According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts *(jure imperii)* of a state, but not with respect to private acts *(jure gestionis)*. . . .
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> . . .[T]he Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the

197. 28 U.S.C. § 1605(a)(2) (1976).
198. *Id.* § 1606.
199. *Id.* § 1603(a)-(b).
200. *Id.*
201. *See* Rabinowitz, *Can the Courts Cope with the Foreign Sovereign Immunities Act?*, 1 N.Y.J. INT'L & COMP. L. 130 (1980).
202. *Id.* at 132-33.
203. *Id.*

> restrictive theory of sovereign immunity in consideration of the requests of foreign governments for a grant of sovereign immunity.
>
> It is realized that a shift in policy by the Executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the Executive has declined to do so . . . .[204]

The fundamental issues raised by the "Tate" letter were explicitly recalled twenty-four years later when the House Judiciary Committee expressed one of the principal aims of the Foreign Sovereign Immunities Act.[205] The Report states:

> Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principle purpose of this bill is to transfer the determination of sovereign immunity from the Executive branch to the Judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that ensure due process.[206]

The House Report unambiguously sets forth the objective of depoliticizing claims arising from the participation of foreign sovereigns in international commercial activities.[207] By de-emphasizing the potential role for intervention by the Chief Executive or the State Department[208] in commercial disputes, the FSIA contributes to the development of predictable and orderly trade relations among actors in the international marketplace by protecting, and therefore encouraging,

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204. 26 DEP'T STATE BULL. 984 (1952), *reprinted in* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 647 (2d ed. 1976).

205. *H.R. Rep.* No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605-06.

206. *Id.*

207. *Id.*

208. *Id.*

the reasonable commercial expectations of participants in the trade process. The FSIA's allocation of competence to the judiciary to scrutinize a foreign sovereign's commercial activity is designed to encourage widespread participation in the legal process and foster the expectation that disputes will be settled in a principled or legal manner, as distinct from dispute resolution that is subject to the vagaries that may attend decision making in politically guided institutions.[209]

Judicial competence to hear claims against foreign sovereigns arising under the FSIA is predicated upon familiar jurisdictional principles.[210] Jurisdiction may be founded upon the sovereign's consent to subject itself to the laws of United States courts.[211] Such consent may be inferred from prior treaties in which the sovereign has consented to waive its immunity or consent may be recognized on the basis of particular contractual provisions in which the sovereign has agreed to be bound by a foreign law.[212] In addition, the Foreign Sovereign Immunities Act incorporates both territorial and effects-based jurisdictional principles to reach foreign-based commercial activity conducted within the United States, as well as foreign-based activity that "causes a direct effect in the United States."[213]

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209. McDougal & Jasper, *The Foreign Sovereign Immunities Act of 1976: Some Suggested Amendments*, in PRIVATE INVESTORS ABROAD 6-12 (Southwestern Legal Foundation ed. 1981).

210. 28 U.S.C. § 1605 (a) (1).

211. 28 U.S.C. § 1605 (a) (1) states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver . . .

212. *See* Ipitrade International S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978) (District court enforced Swiss arbitration award against Nigeria on the basis of Nigeria's contractual agreement to be bound by Swiss arbitration.); *see also* Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980) (Libya's agreement to arbitration in contract constituted a waiver of immunity); *but see* Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980) (foreign sovereign's waiver of immunity before the courts of another sovereign did not necessarily constitute a waiver of immunity before American courts).

213. 28 U.S.C. § 1605 (a) (2) (1976) states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or

The key inquiry for the purposes of suit under the FSIA is whether the challenged conduct of the foreign state is fundamental to a governmental purpose or whether it is merely a commercial activity.[214] Section 1603(d) of the FSIA provides:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commerical character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, *rather than by reference to its purpose.*[215]

By directing judicial attention toward "the nature" of a foreign sovereign's activities, instead of toward the possible governmental purposes that might have motivated a government to engage in a particular activity, Congress created an objective test for courts to follow that minimizes the possibility of extending the grant of immunity beyond the most fundamental of government acts and processes.[216]

> upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

214. Consider *In re* Investigation of World Arrangements, 13 F.R.D. 280, 290 (D.D.C. 1952). The English government's control of the Anglo-Iranian oil corporation for the purpose of supplying oil to the British Navy was held to be a governmental function to which immunity might attach. In United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929), service to the corporate defendant was upheld even though controlled by the French government for the reason that French law permitted suit against the corporation.

215. 28 U.S.C. § 1603 (d) (1976) (emphasis added).

216. *H. R. Rep. No.* 11,487, 94th Cong., 2d Sess. 45 (1976). In an elaboration on the point raised here, Judge Choy has written:

> The purpose test, which asks whether the act in question was undertaken for sovereign ends, is subjective. The nature test, which focuses on the nature of the act itself is objective. The purpose test grants broader immunity, since even the most commercial activity could have an underlying governmental purpose. . . . The problem with the purpose test is that the expectations of the . . . seller relying on the commercial appearance of the activity would be frustrated if the foreign government could claim immunity and disclaim its obligation to pay. Only the objective test would protect the seller's reliance on the commercial appearance of the purchase as commercial activity subject to domestic laws.

Int'l Ass'n of Machinists & Aerospace Workers v. Organization of the Petroleum Export-

The FSIA test for "commercial activity" has functioned to produce clearcut findings of sovereign liability in a number of cases. In *Texas Trading v. Federal Republic of Nigeria and Central Bank of Nigeria*[217] the Court of Appeals for the Second Circuit easily disposed of Nigeria's claim for sovereign immunity in litigation arising out of that country's repudiation of letters of credit involving massive purchases of concrete.[218] Judge Kaufman stated, "Nigeria's activity here is in the nature of a private contract for the purchase of goods. Its purpose—to build roads, army barracks, whatever—is irrelevant."[219]

The distinction between commercial and governmental activity, although narrowly defined in the Foreign Sovereign Immunities Act, can virtually dissolve, however, when the commercial activity centers around a politically volatile commodity such as oil.[220] In *International Association of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*[221] the labor union (IAM) filed suit against the members of OPEC alleging that their price-fixing activities violated America's antitrust laws. Judge Hauk, writing for the district court, reasoned that in as much as the control of natural resources has been recognized under international law principles to be a prime government function,[222] the disposition of those resources could be recognized to stem "from the nature of sovereignty."[223]

Judge Hauk explained further that:

> The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue producing resource, is crucial to the welfare of their nations' peoples. . . . [T]here can be little question that establishing the terms and conditions for removal of natural resources from its territory, when done by a sovereign state individually and separately, is a governmental activity.[224]

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ing Countries, 649 F.2d 1354, 1357 n.6 (9th Cir. 1981) [hereinafter cited as *IAM v. OPEC*].

217. 647 F.2d 300 (2d Cir. 1981). *See also IAM v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979); Perez v. Bahamaz, 482 F. Supp. 1208 (D.D.C. 1980).

218. 647 F.2d at 300.

219. *Id.* at 310.

220. *Id.*

221. 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981).

222. 477 F. Supp. at 567.

223. *Id.* at 567-68.

224. *Id.* at 568.

The effect of the district court's decision in *IAM v. OPEC* was to place the activities of certain state trading cartels beyond the purview of American courts. It appears safe to assume that Judge Hauk did not intend to immunize all types of foreign sovereign commodity activity involving their natural resources, as such a decision would clearly be at odds with the restrictive approach to immunizing sovereign activity that is contained in the FSIA.[225]

IAM subsequently argued on appeal that the district court had erred by making reference to the sovereign purposes that could be used to explain OPEC's price-fixing activities.[226] IAM reasoned that as their complaint had specifically been framed with reference to price-fixing, it was improper for the district court to have looked beyond that activity in order to support a grant of immunity pursuant to the FSIA.[227]

Judge Choy, writing for the Court of Appeals for the Ninth Circuit, agreed with IAM's reasoning, but went on to deny entirely the applicability of the FSIA to OPEC's activities.[228] Judge Choy then resorted to the act of state doctrine to extricate the court from the narrow frame of reference required by the Foreign Sovereign Immunities Act for a consideration of the challenged conduct of OPEC.[229]

Judge Choy reasoned that the price-fixing activity of OPEC included a significant sovereign component which required that the court look beyond the question of price-fixing to consider the sovereign's motivations,[230] thus raising an act of state issue. Judge Choy then stated: "When the state *qua state* acts in the public interest, its sovereignty is asserted."[231]

The focal question is whether Judge Choy's analysis preserves the distinction between sovereign and commercial acts by governments. The discovery of a "significant sovereign component" should not be considered apart from the whole sequence of events that comprise the challenged activity, for even the most blatantly commercial activity

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225. Judge Hauk's decision can be further criticized for failing to set forth adequate guidelines for distinquishing "*Opec*-type" state trading activities from lesser types of governmental involvement in commercial arenas. The "sole natural resource" analysis carried out by the District Court created an immunity within the FSIA that could apply to much of the world's trading activity. *See* Note, *IAM v. OPEC: Political Question or Commercial Activity*, 1 N.Y.J. Int'l & Comp. L. 173 (1980).

226. *IAM v. OPEC*, 649 F.2d at 1358.

227. *Id.* at 1358-59.

228. *Id.*

229. *Id.*

230. Judge Choy wrote: "The Act of State Doctrine is apposite whenever the federal courts must question the legality of the sovereign acts of foreign states." *Id.* at 1359.

231. *Id.* at 1360.

carried on by a sovereign might then fall into such an exception. The immunization of commercial activity on such grounds is clearly at odds with the legislative history of the FSIA.[232]

A reader might possibly infer from Judge Choy's reasoning in the *IAM v. OPEC* case that the price-fixing activities of the OPEC members were so interrelated with the sovereign acts of those nations that no viable distinction between sovereignty and commercial activity could by made by the court. Such an approach, however, produces a judicial blurring of the distinction between acts *jure imperii* and acts *jure gestionis*. The Ninth Circuit's opinion in *IAM v. OPEC* demonstrates that the inevitable result of a fusing of the two concepts is a demise of the commercial activity exception in favor of a highly politicized world marketplace.

Controversies such as IAM's suit against OPEC may, in fact, raise issues that are beyond the competence of the courts, but it is no solution to that dilemma to permit the immunity principle embodied in the act of state doctrine to undermine the restrictive immunity principle of the FSIA and the policy of commercial predictability that it fosters. The two doctrines should operate in a parallel fashion so as not to defeat each other. A more appropriate ground for judicial withdrawal from a particular controversy might be found by resort to the political

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232. Judge Choy found that the FSIA had in no way superseded or limited judicial recourse to the act of state doctrine. 649 F.2d at 1359. But a fair reading of the House Judiciary Report, which accompanied H.R. 11315, might well produce a different impression. It was noted there that:

> The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the art [*sic*] of state doctrine may be improperly asserted to block litigation. . . . The committee has found it unnecessary to address the act of state doctrine since decisions such as that in the *Dunhill* case (425 U.S. 682) demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. . . . The conclusions of the Committee are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General states: "Under the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine. (Amicus Brief of the United States, p. 41)."

H.R. REP. No. 94-1487, 94th Cong., 2d Sess. 20 n.1, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6619 n.1.

question doctrine. While this response may also reflect judicial deference toward the separation of powers, it can serve to turn the focus of inquiry away from an unprincipled conjectural analysis about the needs a branch of the government might have for latitude and freedom from judicial interference and redirect judicial analysis toward the appraisal of a controversy in light of the adequacy of existing enactments, legal principles, and ongoing trends of decision concerning the allocation of authority within governmental institutions.[233]

V. Conclusion

It would be unrealistic to expect the simplistic formula offered in Section 1603(d) of the FSIA to crystallize for all time a distinction between sovereign acts and commercial activity. Sovereignty and commerce are concepts that are determined by a broad range of changing conditions.[234] The nature of sovereign authority or acts *jure imperii* is not fixed.[235] Similarly, commercial contexts are subject to extensive changes.[236] Free markets may become regulated markets; natural monopolies may evolve through technological advances to become competitive. Environmental conditions may impose limitations on the freedom of actors to exploit a particular commodity. The application of antitrust laws to the international marketplace requires, as does the FSIA, both a judicial sensitivity toward the profound changes that can affect the very character of the marketplace, and the vision to work toward principled outcomes that serve to clarify and foster shared ex-

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233. *See, e.g.*, the Supreme Court's decision in Baker v. Carr, 369 U.S. 186 (1962), wherein Justice Brennan stated:

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Id. at 211-12.

234. *See* notes 235 and 236 *infra*.

235. *Cf. IAM v. OPEC*, 477 F. Supp. 553 (9th Cir. 1981)(similar holding).

236. *See generally* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

pectations about the efficacy of the global market and the international system.

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